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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Inter-Carrier Compensation for
ISP-Bound Traffic

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CC Docket No. 99-68

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF MCI WORLDCOM, INC.

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SUMMARY

A commanding number of commenters in this proceeding generally support the adoption of a federal rule that would require local exchange carriers to pay each other symmetrical, TELRIC-based compensation for the costs incurred in transporting and terminating traffic to ISPs. Most commenters also agree that other aspects of this compensation requirement, including the ultimate determination of rates, should be left to the state-supervised negotiation and arbitration process dictated by Sections 251 and 252 of the Telecommunications Act of 1996. This proposed shared federal/state approach would properly compensate LECs for the actual economic costs legitimately incurred in carrying traffic to ISPs, and best comports with the consistent treatment of ISP-bound calls as local traffic for all other applications -- including access charges, separations, and end user customer dialing.¹

In contrast, the ILECs' attempts to evade their contractual obligations, and consequently obtain a "free ride" on the CLECs' networks, must be rejected. Just like any other local carrier, the incumbents must be held accountable for the transport and termination costs their end user customers impose on other carriers' local networks. The ILECs' allegations that CLECs perform no compensable function in carrying traffic to ISPs is belied by the facts, and the ILECs' own earlier claims to the Commission that ISPs impose significant costs on the terminating end of local exchange facilities and networks. Ameritech's argument that it is losing money providing originating service to ISPs is betrayed by significant flaws in its cost analysis, and its own enthusiastic embrace of such services; in any event, this claim is irrelevant to the question of how to compensate LECs for terminating ISP-bound traffic. The ILECs' further

¹ MCI WorldCom's support for a federal compensation rule in this proceeding does not mitigate the fact that the Commission was incorrect in concluding that ISP-bound traffic is jurisdictionally interstate.

attempts to analogize the ISPs' use of the local network to Feature Group A, and force-fit ISPs into some version of the interstate access charge system, ignores the ironclad rule that ISPs are end users, not carriers, and act just like other end users in utilizing, and paying for, services provided via local networks. Finally, claims that the FCC lacks authority to impose reciprocal compensation obligations on the termination of ISP-bound traffic completely overlooks the Commission's plenary Title II jurisdiction to regulate interstate telecommunications services, as well as adopt federal rules implementing all aspects of the 1996 Act. In short, the ILECs argue long and loud, but they do not argue well.

Most parties agree with MCI WorldCom that there is no need for the Commission to address the so-called "most favored nation" provision of the 1996 Act at this time. Instead, any attempt to reconsider the substance of the Commission's rule implementing Section 252(i) should be addressed in a generic rulemaking proceeding.

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REPLY COMMENTS OF MCI WORLDCOM, INC.

MCI WorldCom, Inc. ("MCI WorldCom"), by its attorneys, hereby files reply comments in response to initial comments submitted by other parties concerning the Notice of Proposed Rulemaking issued by the Commission in the above-captioned proceeding.¹ The vast majority of non-ILEC commenters support MCI WorldCom's view that the Commission should adopt a federal rule requiring carriers to pay each other symmetrical, TELRIC-based compensation for the costs incurred in carrying ISP-bound traffic, while leaving the ultimate determination of actual rates to the state-supervised negotiation and arbitration process dictated by Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act"). In contrast, the ILECs' arguments against equitable compensation for transporting and terminating ISP traffic are fatally flawed, and should be roundly rejected.

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, issued February 26, 1999, appeal pending, MCI WorldCom, Inc. v. FCC, Case No. 99-1097 (D.C. Cir. 1999) (hereinafter "Declaratory Ruling" and "Notice," respectively).

I. NON-ILECS GENERALLY AGREE THAT THE COMMISSION SHOULD ADOPT A FEDERAL RULE REQUIRING SYMMETRICAL, TELRIC-BASED TERMINATION COMPENSATION RATES, WHILE LEAVING OTHER SALIENT DETAILS TO THE STATE-SUPERVISED NEGOTIATION AND ARBITRATION PROCESSES

It takes little insight to understand precisely what is at stake in this proceeding: the ILECs seek to be able to send telecommunications traffic from their customers to CLEC customers without paying for it. While the ILECs' motivation is clear, the critical point is that they are attempting to hijack the regulatory process in order to gain a "free ride" on the CLECs' networks. In the name of simple equity and fair competition, the Commission should not allow this to happen.

In its initial comments, MCI WorldCom recommended that the Commission adopt a federal rule to govern ISP-bound traffic. The rule should include the following components:

1. When a local exchange carrier delivers traffic to end users that are Internet service providers, the local exchange carrier incurs the same transport and termination costs that it incurs when delivering local exchange traffic to other end users.
2. Local exchange carriers are to be compensated for delivering traffic to Internet service providers by the local exchange carrier on whose network the calls originated, or the interexchange carrier over whose network the calls were transmitted. The originating carrier is prohibited from adopting carrier access-like arrangements that would require the compensation to be paid by the terminating carrier, or an Internet service provider or other end user.
3. Compensation shall be set at the same reciprocal compensation rate applied to local exchange traffic. This rate is to be based upon the incumbent local exchange carrier's total element long-run incremental (TELRIC) cost of terminating local exchange traffic. Where the local exchange carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the incumbent LEC tandem rate. CLECs shall not be required to provide their own cost studies.
4. Such compensation rates shall be established under interconnection agreements negotiated

and arbitrated pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, and applicable Commission regulations.

MCI WorldCom demonstrated that this proposed four-part rule would best advance the Commission's goals in this proceeding. In particular, the Commission would be able to (1) ensure the broadest possible entry of efficient new competitors (because CLECs would recover their legitimate costs of doing business), (2) eliminate incentives for inefficient entry and irrational pricing schemes (by basing the compensation rates for all local and ISP traffic on the TELRIC pricing methodology), and (3) provide to consumers as rapidly as possible the benefits of competition and emerging technologies (by enabling CLECs to continue to serve those particular users, which in turn leads to increased competition, lower prices, higher quality of services, and speedier deployment of innovative services). Further, such a rule would have several other public policy benefits, including maintaining consistency with other local competition rules and with the FCC's traditional local treatment of ISP-bound traffic for all other purposes. In particular, the payments and receipts for transporting and terminating ISP-bound traffic would continue to be treated as intrastate for separations purposes.²

Nearly every non-ILEC commenting in the opening round of this proceeding agrees with fundamental aspects of MCI WorldCom's proposed rule; namely, the adoption of explicit federal rules mirroring obligations under Sections 251 and 252 of the 1996 Act,

² MCI WorldCom Comments at 19-20. As noted in its initial comments, MCI WorldCom strongly disagrees with the Commission's view that ISP-bound traffic is jurisdictionally interstate, and assumes the correctness of the Commission's conclusion only for purposes of participating in this proceeding. MCI WorldCom Comments at 4-5.

combined with state implementation.³ For example, the General Services Administration agrees that ISP-bound traffic should be governed by Sections 251 and 252, buttressed by national guidelines requiring TELRIC-based rate structures.⁴ Many state public service commissions, including California, Florida, and Texas, argue for a negotiation and arbitration process built on the foundation of Section 251 and 252,⁵ while the New York Department of Public Service supports the Commission's proposal to rely on the states' supervision of the commercial negotiation process, including the arbitration of disputes over ISP-bound traffic.⁶ Sprint puts the issue squarely: whatever it might be labeled for jurisdictional purposes, traffic terminating to ISPs should be treated as if it were local traffic, and thus subject to Sections 251 and 252 of the 1996 Act.⁷

Not surprisingly, the ILECs -- viewing the world through their narrow prism as net payors of reciprocal compensation to CLECs for ISP-bound traffic -- adamantly oppose any requirement that they continue to pay such compensation. As will be explored below, the ILECs' objections amount to nothing more than a blatant campaign to deny CLECs their rightful payment for carrying traffic from ILEC customers to CLEC customers.

³ CompTel Comments at 13-17; ALTS Comments at 6-7; AT&T Comments at 4-7; CIX Comments at 2.

⁴ GSA Comments at 3.

⁵ California PUC Comments at 3-4; Florida PSC Comments at 5-7; Texas PUC Comments at 5-6.

⁶ New York DPS Comments at 2.

⁷ Sprint Comments at 3.

II. THE COMMISSION SHOULD FLATLY REJECT THE ILECS' TRANSPARENT ATTEMPTS TO EVADE THEIR CONTRACTUAL OBLIGATIONS, AND GAIN A "FREE RIDE" ON THE CLECS' NETWORKS

In their initial comments, the ILECs collectively appear to challenge the Commission's tentative conclusion on three separate grounds: (1) CLECs are not entitled to recover from ILECs the costs of terminating traffic to ISPs; (2) if CLECs are entitled to recover some form of compensation, it should be far less than the reciprocal compensation rates charged by ILECs for terminating traffic to other end users; and (3) if CLECs are entitled to receive reciprocal compensation, the Commission nonetheless has no legal authority to impose such a requirement. MCI WorldCom will consider each argument in turn.

A. All LECs Are Entitled To Compensation For The Costs Incurred In Terminating Traffic

Despite their overblown rhetoric about CLECs currently obtaining "enormous subsidies" and "undeserved windfalls" via the reciprocal compensation mechanism,⁸ several of those very same ILECs openly acknowledge that carriers incur definite economic costs when terminating traffic to ISPs. For example, Ameritech states that the Commission's observation that LECs incur a cost when terminating traffic to ISPs "is, of course, correct,"⁹ while US West admits that the Commission's conclusion "is true."¹⁰ While both ILECs quickly attempt to change the subject, their admissions are telling.

⁸ Bell Atlantic Comments at 1; US West Comments at 10.

⁹ Ameritech Comments at 8.

¹⁰ US West Comments at 8.

1. CLECs incur economic costs in carrying traffic to ISPs

The initial comments present compelling evidence that all LECs incur actual economic costs when they terminate traffic to ISPs. As one example, Global NAPs provides a detailed analysis of the various types of functions performed by LECs in carrying traffic to an ISP's point of presence ("POP"). Fred Goldstein, on behalf of Global NAPs, describes many of the critical services and functions that CLECs provide to ISPs -- services and functions which the ILEC itself otherwise would be incurring costs to provide if the ISP were its customer. Goldstein also describes additional functions undertaken by CLECs, such as collocation facilities and reliable ISDN PRI services, which the ILECs typically have failed to provide to ISPs.¹¹

In fact, the ILECs long have issued allegations about the significant costs imposed on their networks when they terminate traffic to ISPs. In the FCC's 1996 inquiry into the ISPs' use of the public switched network, the ILECs complained bitterly about the network congestion caused by ISP traffic on their networks. The ILECs expressly claimed that this alleged congestion was being caused by heavy ISP traffic on the ILECs' terminating local switches. For example, Bell Atlantic took the position that the Commission needed to address the growing congestion in the ILECs' central office switches and facilities, and interoffice trunk facilities, serving ISPs.¹² In its Section 706 petition, Bell Atlantic admitted that the growth of the Internet "has caused some traffic congestion in certain Bell Atlantic switches, especially those

¹¹ Global NAPs Comments, Statement of Fred Goldstein at paras. 6-7.

¹² BA/NYNEX Comments, CC Docket No. 96-263, filed March 24, 1997, at i, 1-6; BA/NYNEX Reply Comments, CC Docket No. 96-263, filed April 24, 1997, at 7.

located near major ISP points of presence."¹³ Ameritech's Section 706 petition also acknowledged that increasing Internet usage brings "continued significant network congestion" on the ILECs' circuit-switched networks.¹⁴ Global NAPs observes that even today, the ILECs do not actively seek traffic terminating to ISPs, and complain that ISPs tie up their terminating lines and facilities.¹⁵

The ILECs' apparent inability or unwillingness to deploy sufficient local facilities at the terminating end of their networks, and their obvious desire to be rid of this traffic, inevitably caused many ISPs to look elsewhere to terminate traffic from their customers -- namely, to CLECs. One obvious conclusion is that CLECs are removing actual economic costs from the ILECs' networks because CLECs are terminating traffic that the ILECs otherwise would be forced to terminate themselves. The problem, of course, is that the ILECs now want to wash their hands of any obligation to compensate CLECs for the very real value they are providing -- relieving the ILECs of the very real costs of terminating ISP-bound traffic.

2. ILEC costs of originating ISP traffic are overblown and irrelevant

Ameritech seeks to change the terms of the debate by focusing on the origination of ISP-bound traffic. In its comments and an accompanying white paper, Ameritech claims that ILECs fail to recover their costs of originating ISP traffic from their own end user customers. As a result, "Ameritech must offer ISP access at a loss."¹⁶

¹³ Bell Atlantic Comments, CC Docket No. 98-11, filed April 6, 1998 (attached White Paper, at 15).

¹⁴ Ameritech Petition, CC Docket No. 98-32, filed March 5, 1998, at 6-7.

¹⁵ Global NAPs Comments at 4-5.

¹⁶ Ameritech Comments at 9.

MCI WorldCom is mystified by Ameritech's argument, and the amount of space devoted to it in Ameritech's comments. LEC origination rates and costs are completely irrelevant to LEC termination rates and costs. More specifically, ILEC concerns about the cost of originating ISP traffic are irrelevant to CLEC costs of transporting and terminating calls on behalf of ILECs.¹⁷

Assuming for the moment that there is any relevance to Ameritech's premise, even a cursory review of Ameritech's cost analysis reveals a number of serious flaws in the methodology and numbers. A few significant infirmities include:

Ameritech provides no support for its claim that the average ISP user calls 90 times per month at an average 26 minutes per call, for a total of 39 hours. If users are on line only half as long as Ameritech says (but still make the same number of calls), this change alone reduces the purported monthly shortfall by up to \$7.00.

Ameritech's "profitability analysis" looks solely at a customer who purchases only Internet access using a local access number, and leaves out other significant sources of revenue, such as interstate PICC and access charges for non-local access.

Ameritech's analysis only addresses one specific type of customer, who purchases a second line solely for Internet access, without demonstrating that this represents the typical Internet customer who fails to provide a revenue stream that covers the costs of serving him or her.

Ameritech assumes that half of all local calls are tandem routed, and that 20 miles of transport are needed, both of which assumptions appear to be dramatically overstated.

Moreover, because the ILEC has significant flexibility to decide when and how to provide ISP-bound services -- such as Internet access via additional lines -- the costs of originating ISP traffic are far from immutable. In fact, the ILECs actively seek such traffic, and

¹⁷ ALTS Comments at 11-12, Attachment A; AT&T Comments at 12.

openly boast about the revenues they derive from data services provided over additional lines. The most recent earnings reports by several ILECs point up this fact. Ameritech's Chairman and CEO, Richard C. Notebart, stated last week that "First quarter revenues from data services increased 40 percent and represented nearly half of our total revenue growth."¹⁸ BellSouth's CEO boasted that his company "continued to drive growth in volumes and revenues by marketing digital and data services [and] additional lines...."¹⁹ Moreover, BellSouth "also continued to boost the penetration of additional lines, installing a quarterly record 126,000 residential customers during January, February, and March."²⁰ SBC announced a similar increase of 33 percent in revenues from data services.²¹ Ameritech's own website also includes advertising for additional lines, enticing its customers with promises that a second line "may make your life a lot easier" because it "allows you to surf the Internet."²² Obviously, it makes no sense for the ILECs to openly court customers to purchase additional lines, and laud their success in increasing the number of such revenue-enhancing sales, and then complain to regulators that they are going broke in the process.

ALTS also points out that the ILECs' complaints about ISP traffic growth is actually a challenge to current retail rate levels, not a challenge to the recovery of termination

¹⁸ "Ameritech Earnings Grow 19.5 Percent in First Quarter," Ameritech Press Release, April 20, 1999, at 1.

¹⁹ "BellSouth Reports 15% Growth in Normalized EPS," BellSouth Press Release, April 20, 1999, at 1.

²⁰ Id.

²¹ "SBC First-Quarter Earnings Per Share Increase 14.3 Percent; Strong Data, Vertical Services, Wireless Demand Fuels Growth," SBC Press Release, April 20, 1999, at 1.

²² See www.ameritech.com/products/answer/main_add.html.

costs.²³ AT&T states that the Commission should reject these complaints because the ILECs can modify their own local retail rates by tariff filings with the state commissions, and have done so repeatedly.²⁴ In fact, Ameritech recently announced a reduction of \$33 million in basic rates for residential customers in Illinois, achieved through a voluntary agreement with the Illinois Commerce Commission.²⁵

Finally, GTE argues that the FCC should adopt an 18 month moratorium on reciprocal compensation for ISP traffic so that the Commission can devise a new, rational framework for interstate access charges and universal service.²⁶ MCI WorldCom certainly agrees that a new, cost-based interstate access charge system is critical. However, GTE's proposal is no more rational than asking the Commission to fix the existing access charge regime by adopting a 18 month moratorium on all payment of interstate access charges to ILECs.

B. ISPs Use Local Service Like Many Other End Users

In support of their view that the interstate access charge regime should govern ISP-bound traffic, many of the ILECs next argue that dialup Internet access is equivalent to Feature Group A line-side connections.²⁷ US West states that an ISP, like an IXC, "switches"

²³ ALTS Comments at 14-15.

²⁴ AT&T Comments at 12.

²⁵ "Ameritech to Cut \$36 Million in Customer Rates in '99," Ameritech Press Release, April 1, 1999.

²⁶ GTE Comments at 19-24.

²⁷ Ameritech Comments at 20; BellSouth Comments at 2-3, 7; US West Comments at 4-5, 15; SBC Comments at 25.

transmissions to the Internet,²⁸ while SBC insists that the only difference between ISPs and IXC's is the types of charges paid to ILEC's.²⁹ Contrary to these claims, however, ISP traffic is just like all other end user traffic, and should be treated as such for purposes of compensating for termination costs.³⁰

Initially, as a legal matter, ISPs are end users, not IXC's. The ILEC's try to curtail the obvious reach of this conclusion by arguing that ISPs are end users only for purposes of the application of interstate access charges.³¹ This is simply nonsense. The Commission's own rules clearly state that enhanced services are not regulated under Title II of the Communications Act for any purpose -- not just access charges.³² If ISPs are not regulated as common carriers, they are mere users of telecommunications services, and as such reside well outside the Commission's Title II jurisdiction.

It is instructive that Section 202(a) of the Communications Act of 1934, as amended, requires nondiscriminatory practices and charges for "like" services.³³ Because LEC services utilized by ISPs and LEC services utilized by other end users are "like" services under Section 202(a), ALTS argues that the Commission cannot discriminate unreasonably between an ISP and another end user in terms of the intercarrier compensation owed for traffic terminating

²⁸ US West Comments at 5.

²⁹ SBC Comments at 7-8.

³⁰ Of course, these observations only serve to underscore why the Commission's conclusion that ISP-bound traffic is jurisdictionally interstate is incorrect.

³¹ See 47 C.F.R. Section 69.2(m) (definition of end user "[f]or purposes of this part").

³² 47 C.F.R. Section 64.702(a).

³³ 47 U.S.C. Section 202(a).

to each.³⁴ MCI WorldCom agrees.

Commenters provide detailed explanations of how ISPs use the local exchange network just like any other end user. For example, Fred Goldstein discusses how calls to ISPs technically are indistinguishable from other types of local calls, both from the consumer's perspective (seven digit dialing, no toll charges) and from the network's perspective (use of destination prefix code or location routing number ("LRN"), answer supervision returned, terminating CLEC identified through local number portability).³⁵ Dr. Selwyn also explains that the local exchange routing function is exactly the same for ISP traffic and other local calls.³⁶

Commenters point up other reasons why ISP traffic should be treated the same as other local traffic. First, the costs of terminating traffic to ISPs and to other end users are the same, regardless of jurisdiction.³⁷ In terms of the cost of providing transport and termination functionalities to ISPs, there is no meaningful difference between ISP traffic and other end user traffic.³⁸ A Gerald Brock paper attached to Cox's comments shows no meaningful cost difference between handling voice calls and ISP calls. ALTS also notes that existing ILEC cost studies for termination of traffic include termination of ISP traffic.³⁹

Second, ISP services functionally are identical to other end user services that

³⁴ ALTS Comments at 12-13; Time Warner Comments at 3-14.

³⁵ Global NAPs Comments, Statement of Fred Goldstein at paras. 15-19.

³⁶ Global NAPs Comments, Affidavit of Dr. Lee Selwyn at para. 11.

³⁷ CompTel Comments at 3-4; AT&T Comments at 8-11.

³⁸ Cox Comments at 7.

³⁹ ALTS Comments at 16-17.

happen to feature significant inbound traffic. Commenters provide an illustrative list of such end users, such as travel agents, PBX users, inbound telemarketing centers, computer support services, chatlines, conference calling centers, bank-by-phone lines, credit verification services, and ticket purchasing agencies.⁴⁰ In each instance, the end user generates a considerable amount of inbound traffic, often with little or no outbound traffic. As far as MCI WorldCom is aware, no party has suggested that this traffic should be subject to any different regulatory treatment and pricing rules than other local end user traffic.

Third, CompTel notes that the ILECs themselves -- the main proponents of separate treatment of ISP traffic -- cannot distinguish between ISP traffic and local traffic.⁴¹ This observation is bolstered by the fact that Ameritech suggests that CLECs be required to identify ISP customers in order to exclude ISP traffic from any compensation obligation.⁴² If ILECs -- with their obvious pecuniary interests -- cannot separate out ISPs from other end users, then such separation must not be possible.

Thus, it should be beyond any reasonable dispute that ISPs function in every pertinent way as the end users they are, utilizing the same facilities and incurring the same costs as any other end user. The compensation owed to carriers for terminating traffic to ISPs should follow the logic of this unassailable conclusion.

⁴⁰ CompTel Comments at 5; ALTS Comments at 13; AT&T Comments at 11.

⁴¹ CompTel Comments at 4.

⁴² Ameritech Comments at 18-19.

C. Compensation For Terminating Traffic To ISPs Should Be Cost-Based, Reciprocal, And Symmetrical

Given the reality that LECs are entitled to recovery of their costs of terminating traffic, and that traffic to ISPs should be treated the same as traffic to any other end user, nearly all non-ILEC parties call for the Commission to require LECs to compensate each other for ISP-bound traffic their customers originate for termination on the other carrier's network. As Dr. Selwyn puts it:

Since ISP-bound "local" calls are in all instances sent-paid by the calling party and as such are a source of local revenues for the ILEC, where the ISP-bound call is handed off to another LEC for delivery to the ISP, it is reasonable and appropriate that the originating LEC compensate the terminating LEC for the costs that the latter incurs and that the former avoids.⁴³

Many parties explain that the existing reciprocal compensation pricing rules should be applied uniformly to ISP traffic,⁴⁴ and urge the Commission to adopt and apply the same TELRIC rate for terminating local voice calls to ISP traffic as well.⁴⁵ These parties argue that applying the same rate will limit the ILECs' ability to "game" the call termination rates, namely by improving the balance in bargaining power between ILECs and CLECs,⁴⁶ and limiting cost study arbitrage

⁴³ Global NAPs Comments, Affidavit of Dr. Lee Selwyn at para. 14.

⁴⁴ CompTel Comments at 3-4; AT&T Comments at 8-11.

⁴⁵ CompTel Comments at 5; ALTS Comments at 10.

⁴⁶ Gerald Brock submitted a paper on behalf of Cox detailing the unequal bargaining power between ILECs and CLECs, and the consequent need for the FCC to adopt rules which clarify the compensation requirements.

by establishing the ILEC cost study as the presumptive proxy.⁴⁷ In addition to reducing arbitrage and gamesmanship, AT&T points out that requiring carriers to compensate each other for terminating ISP traffic will prevent the ILECs from gaining a "free ride" on the CLECs' networks.⁴⁸ Using the same rate also prevents the need to accomplish the impossible, namely the separation and measurement of ISP traffic vis-a-vis other local traffic.⁴⁹

Nonetheless, the ILECs propound a number of alternative means of recovering the costs of terminating ISP-bound traffic. For example, SBC states that LECs should be allowed to assess: (1) interstate surcharge on ISPs, (2) access charges on CLECs, or (3) access charges to ISP subscribers.⁵⁰ Ameritech insists that CLECs should either absorb costs of terminating traffic or raise their rates to ISPs,⁵¹ while several ILECs argue that carriers should be limited to payments from their own customers.⁵² In another proposal, BellSouth states that CLECs should be compelled to share their ISP revenues with the ILECs because they constitute access revenues which are normally shared by two LECs jointly providing service.⁵³ Finally, Ameritech urges the outright repeal of the ESP "exemption" and asks the Commission to impose

⁴⁷ CompTel Comments at 7-9. As ALTS notes, the ILECs seek high termination rates, or UNE rates, only when applied to their own networks, and paid by CLECs. ALTS Comments at 15-16.

⁴⁸ AT&T Comments at 15.

⁴⁹ CompTel Comments at 9.

⁵⁰ SBC Comments at 22-23.

⁵¹ Ameritech Comments at 11.

⁵² Bell Atlantic Comments at 6-7; US West Comments at 8; SBC Comments at 22-23.

⁵³ BellSouth Comments at 8-9; US West Comments at 3, 8.

interstate access charges on ISPs.⁵⁴

The ILEC proposals all share a common theme: the ILECs should not be deemed responsible for the transport and termination costs their end user customers impose on CLEC networks. As Dr. Selwyn points out, this viewpoint is completely at odds with the "sent paid" nature of local traffic. In most cases, the calling party pays its local exchange carrier flat-rated unlimited or per-message untimed local calling to a defined set of exchanges. As a result, ILECs handing off ISP-bound traffic to CLECs are collecting usage revenues from the calling party.⁵⁵ Because the CLEC essentially is "standing in the shoes" of the ILEC by transporting and terminating the ILEC-originated ISP traffic -- at the CLEC's expense -- the ILEC is able to avoid the considerable costs that it otherwise would have to incur. The CLEC is entitled to compensation from the ILEC; otherwise, the ILEC will be receiving revenues from its end user regardless of whether the ILEC or the CLEC terminates the traffic.⁵⁶

In its Access Reform Order, the FCC once again rejected efforts by the ILECs to force ISPs to pay interstate access charges for their use of local exchange networks. The Commission stated that:

The mere fact that providers of information services use incumbent LEC networks to receive calls from their customers does not mean that such providers should be subject to an interstate regulatory

⁵⁴ Ameritech Comments at 10.

⁵⁵ Global NAPs Comments, Affidavit of Dr. Lee Selwyn at paras. 14-16.

⁵⁶ In addition, the ILECs always are free to attempt to assess new or additional charges or rate structures on their own end user customers. What the ILECs cannot do, however, is use the regulatory process to mandate increased prices for the CLECs' own customers to pay. CLECs won the bulk of ISP business away from the ILECs by offering faster, more reliable services at lower prices; the ILECs cannot be allowed to reverse these competitive benefits by interposing themselves needlessly between the CLECs and their customers.

system designed for circuit-switched interexchange voice telephony.⁵⁷

Again, as explained above, ISPs use the local networks just as other users do, and pay the same types of charges for that use. This same lesson should apply to the compensation mechanism applied to the transport and termination of ISP traffic.⁵⁸

Finally, Ameritech argues that, under Section 252(d)(2) of the Act, reciprocal compensation must reflect the costs of the terminating carrier.⁵⁹ GTE claims that CLECs should have far fewer costs than ILECs because CLECs employ a far less complex and robust local exchange network.⁶⁰ Of course, the Commission concluded otherwise in the Local Competition Order, where it adopted the ILECs' transport and termination prices as a presumptive proxy for the CLECs' costs of termination.⁶¹ The Commission found that "the forward-looking economic costs should be similar in most cases,"⁶² and that the ILECs are in a far better position than smaller carriers to conduct the necessary economic cost studies.⁶³ As

⁵⁷ Access Charge Reform Order at para. 288.

⁵⁸ Of course, consistent with the ILECs' obvious desire to subject ISP-bound traffic to the existing access charge regime, another reasonable option is for local carriers to pay each other terminating access charges for this traffic. While MCI WorldCom believes that local treatment of ISP-bound traffic best comports with local competition policy and the facts, it would have no objection to a federal rule that would require ILECs to compensate CLECs based on the ILECs' intrastate or interstate terminating access charges. Such a rule would have the beneficial effect of incenting the ILECs to drastically lower their terminating access charges closer to actual economic cost.

⁵⁹ Ameritech Comments at 24.

⁶⁰ GTE Comments at 8.

⁶¹ Local Competition Order at para. 1085.

⁶² Id.

⁶³ Id.

MCI WorldCom pointed out in its initial comments, because ILECs enjoy considerable economies of scale, scope, and density in provisioning services, it is likely that CLECs' costs of terminating traffic actually are significantly higher than the ILECs' termination costs. Under these circumstances, the ILECs' costs surely are more than a reasonable proxy for CLEC costs.

D. The FCC Has Ample Legal Authority To Require Payment of Compensation For Traffic Terminating To ISPs

Finally, the ILECs argue that (1) the FCC lacks legal authority to impose Section 251 and 252 obligations on interstate ISP traffic, (2) the FCC cannot delegate any such authority to the states, and (3) the states likewise lack such authority.⁶⁴ None of these arguments carries the day.

It is beyond dispute that the FCC retains plenary jurisdiction to regulate all interstate and foreign communications services.⁶⁵ Under Title II of the Communications Act of 1934, as amended, the Commission can -- among other things -- require interstate carriers to (1) interconnect with each other, (2) establish just and reasonable charges, practices, classifications, and regulations, and (3) refrain from unjust or unreasonable discrimination.⁶⁶ The Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [1934] Act."⁶⁷

⁶⁴ USTA Comments at 4; Ameritech Comments at 15-19; Bell Atlantic Comments at 4; BellSouth Comments at 4-5; US West Comments at 13-15; SBC Comments at 5-7, 17-18; GTE Comments at 12.

⁶⁵ 47 U.S.C. Section 152(a).

⁶⁶ 47 U.S.C. Sections 201(a), 201(b), 202(a).

⁶⁷ 47 U.S.C. Section 201(b).

Further, the Commission's rulemaking authority now extends to the local competition provisions of the 1996 Act. The Supreme Court acknowledged that the Act "gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."⁶⁸ Surely, if the Commission possesses authority to design a costing and pricing methodology for intrastate services,⁶⁹ it possesses authority to design a costing and pricing methodology -- including one based on the framework provided in Sections 251 and 252 of the 1996 Act -- for interstate services.

The Commission's authority over intercarrier compensation for ISP-bound traffic is further enhanced by the fact that, under the Commission's theory, the traffic at issue is jurisdictionally mixed, and inseverable. Indeed, all major ILECs filing comments in this proceeding agree that ISP traffic is inseverable and cannot be divided into separate interstate and intrastate jurisdictions.⁷⁰ Non-ILECs also find that ISP traffic is jurisdictionally mixed (both interstate and intrastate), and inseverable (costly, difficult, and impracticable to separate).⁷¹ Under these circumstances, inseverability bolsters the need for uniform regulatory treatment, and the Commission is well within its statutory authority to adopt rules which treat ISP-bound traffic as if it were intrastate traffic.

The ILECs also ignore the fact that ISP-bound traffic historically, and currently,

⁶⁸ AT&T Corp. et al. v. Iowa Utilities Board, 119 S.Ct. 721, 142 L. Ed. 2d 834, 1999 WL 24568 (US) (Jan. 25, 1999), slip op. at 6.

⁶⁹ Id. at 7.

⁷⁰ Ameritech Comments at 27-28; Bell Atlantic Comments at 7-8; BellSouth Comments at 10-12; US West Comments at 18-19; SBC Comments at 24-25; GTE Comments at 17.

⁷¹ AT&T Comments at 17-19, Exhibit A; ITAA Comments; ALTS Comments at 10 n.12; Texas PUC Comments at 8.

has been treated as intrastate for all other purposes. From end user customer rating and billing to separations, from tariffing to interconnection agreements, from what ISPs pay to use the local exchange to how the ILECs themselves have classified and treated ISP traffic, traffic bound for ISPs consistently has been viewed as local.⁷² The Commission always has possessed the requisite authority to require, and delegate to the states, this treatment in all these different contexts; the authority likewise exists for purposes of determining intercarrier compensation.

III. PARTIES GENERALLY AGREE THAT THE FCC NEED NOT REEXAMINE THE MFN PROVISION IN THE CONTEXT OF THIS PROCEEDING

Finally, most parties urge the Commission not to address the substance of Section 252(i) of the Act, the so-called "most favored nation" ("MFN") clause, or its applicability to specific provisions in interconnection agreements. AT&T states that the Commission should not attempt to undertake a wholesale revision of its MFN rules in the context of this proceeding,⁷³ while ALTS agrees that the appropriate interpretation of Section 252(i) is a far larger issue than ISP traffic.⁷⁴ The Florida PSC also requests that the Commission deal with any questions about current MFN rules in a generic proceeding.⁷⁵ MCI WorldCom agrees.

Several of the ILECs claim that MFN rights do not apply to reciprocal compensation for ISP traffic because the pertinent statutory provision is limited to "any

⁷² See, e.g., Declaratory Ruling and Notice at paras. 23-24.

⁷³ AT&T Comments at 20-22.

⁷⁴ ALTS Comments at 20-21.

⁷⁵ Florida PSC Comments at 7.

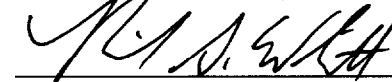
interconnection, service, or network element."⁷⁶ This argument is nonsense. The transport and termination of telecommunications obviously constitutes an aspect of "interconnection," and a "service," which falls well within the boundaries of Section 252(i). Furthermore, the fact that SBC and GTE argue at length about the substantive merits of the Commission's MFN rule demonstrates that these ILECs agree that the provision does indeed apply to ISP traffic.⁷⁷

IV. CONCLUSION

The thrust of the initial comments in this proceeding is clear: the Commission should adopt a federal rule requiring symmetrical, TELRIC-based reciprocal compensation for ISP-bound traffic, while leaving the ultimate determination of actual rates to the state-supervised negotiation and arbitration processes dictated by Sections 251 and 252 of the Telecommunications Act of 1996.

Respectfully submitted,

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⁷⁶ 47 U.S.C. Section 251(i); see Ameritech Comments at 21-27; Bell Atlantic Comments at 8; US West Comments at 17.

⁷⁷ SBC Comments at 32-33; GTE Comments at 24-26.

CERTIFICATE OF SERVICE

I, Denise E. Miller, hereby certify that I have this 27th day of April, 1999, sent a copy of the foregoing "Reply Comments of MCI WorldCom, Inc." in CC Docket No. 99-68, by hand delivery, to the following:

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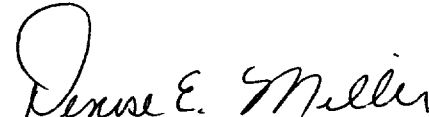
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